IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

ORDER
IN
S.B. Civil Second Appeal No.7/1987

Mohan Lal (since deceased) through LRs
Vimal Kumar & Others
...appellants
Versus
Thakurji Shri Shyam Sunderji
at Kishanpole Bazar,
Chowkari Topkhana Desh, Jaipur,
through Revati Prasad Sharma
...plaintiff-respondent
AND
Smt. Manohar Devi W/o Shri Mool Singhji
Charan Rajput And Four Others
...defendant-respondents

Date of Order ::: 6th October, 2006

Present
Hon'ble Mr. Justice Narendra Kumar Jain

Shri Sagar Mal Mehta, Sr. Advocate, with
Shri D.S. Poonia, Counsel for appellants
Shri Ganga Lahari Pareek, Sr. Advocate, with
Shri A.N. Sharma, Counsel for plaintiff-respondent
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//REPORTABLE//

By the Court:-

Defendant no.1 Mohan Lal has preferred this second appeal against the judgment and decree dated 24th of September, 1986 passed by the Additional District & Sessions Judge No.5, Jaipur City, Jaipur, in Civil Regular Appeal No.54/1981, whereby the first appellate court set aside the judgment and decree passed by the lower court dismissing the suit of the plaintiff, and decreed the suit of the plaintiff-respondent no.1 for

pre-emption in respect of the property, in dispute.

This Court formulated the following substantial questions of law involved in this second appeal:-

> 1. Whether in absence of any pleading, evidence or issue as to the matters covered by the provisions of Section 6(1)(ii) and (iii) pleading the stair-case to be common and/or the relationship between the plaintiff and the defendant no.2 being those of the owners of the property servient or dominant to the property transferred having been specifically pleaded and established?
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> 2. Whether the plaintiff Thakurji Shri Shyam Sunderji Virajmaan through Revati Prasad Sharma has locus standi to file the present suit for pre-emption against the defendants and further whether the temple of plaintiff Thakurji Shri Shyam Sunderji Virajmaan belongs to Meena community or it is a personal property of Revati Prasad Sharma.

Both the learned counsel for the parties argued the case at length on the aforesaid substantial questions of law and in support of their respective contentions cited case law also.

Briefly stated the facts of this second appeal are that on 4th of January, 1969 the plaintiff-respondent no.1 (hereinafter shall be referred to as 'the plaintiff') filed a suit for pre-emption under the

provisions of the Rajasthan Pre-emption Act, 1966. It was pleaded in the plaint that the plaintiff's temple is situated in Chowkari Topkhana Desh at Kishanpole Bazar, Jaipur City, Jaipur. The description of the temple was given in Para 1 of the plaint. It was further pleaded that there is one room facing eastern side towards northern side of the temple and one 'medhi' belonging to defendant no.2, which has been sold by him to defendant no.1 through sale-deed dated 18th of October, 1968, registered on 13th November, 1968 for a consideration of Rs.3000/-. A map was also annexed with the plaint. The plaintiff's temple, shops and staircase were shown in yellow colour and the sold property was shown in blue colour. It was also pleaded that there is only one way to go on the said room and 'medhi' through the staircase and roof of veranda belonging to the plaintiff. There is one door belonging to the plaintiff on the said staircase, which is closed and opened by the plaintiff only. The plaintiff further pleaded that the defendant no.2, without giving any notice or asking to the plaintiff, sold the aforesaid room, 'medhi' and roof of veranda to the defendant no.2 whereas the plaintiff had preferential right to purchase the said room and 'medhi' and, as such, the plaintiff is entitled to get the said property after payment of Rs.3000/- (Rupees three thousand only), to the defendants. When the plaintiff came to know about the said sale then he immediately

told the defendants to sale the said property to the plaintiff after taking a sum of Rs.3000/- and give possession of the same but the defendants refused for the same, therefore, the cause of action arose on 18th of October, 1968 and the suit was filed within the period of limitation. It was prayed in the plaint that a decree be passed in favour of the plaintiff and against the defendants in respect of the property, as described in Para 2 of the plaint, for possession after payment of Rs.3000/- by the plaintiff to the defendant no.2.

The defendant no.1 filed his written statement wherein he denied the contents of the plaint, as mentioned by the plaintiff. The execution and registration of the sale-deed was accepted but other contents were denied. It was admitted that to reach at the disputed house a person has to pass through staircase facing eastern side and thereafter from the roof of verandas but all roofs of verandas are a Government property and the plaintiff has no right of ownership on them. So far as permission of the plaintiff to purchase the disputed house is concerned, it was pleaded that the plaintiff is a deity, who is perpetual minor, therefore, there was no question of asking the deity. So far as Revati Prasad Son of Shri Hira Lal Pujari is concerned, a consent was taken from him. It was also pleaded that he told Revati Prasad that in case trustees want to purchase the disputed room and 'medhi'

with roof of veranda then they may purchase it, but they shown their inability to purchase the same for a consideration of Rs.3000/-. The plea of estoppal and waiver was also taken in the written statement. It was also pleaded that the plaintiff is neither a co-sharer of first degree nor second degree. The right of pre-emption in property was denied. It was also pleaded that pre-emption has been claimed on the basis of right of way and even if the roof used as way is assumed to be of plaintiff then also the right of way goes only up to the roof of veranda belonging to Sita Bai and not thereafter, therefore, there is a break in his right. It was also pleaded that all verandas in Kishanpole Bazar, Jaipur City, is a public property. It was also pleaded that shops belong to Thakurji Shri Shyam Sunderji and deity cannot claim any right of pre-emption. It was also pleaded that the temple of Thakurji Shri Shyam Sunderji belong to Meena Community and Bhairon Sahai and other Meenas are its trustees and they are Sewayat and Manager of the deity. Revati Prasad is merely a Pujari and his position is not more than a servant, therefore, Pujari has no right to file a suit. The other pleas were also taken in the written statement and it was prayed that the suit of the plaintiff be dismissed with costs.

The defendant no.2 also filed his separate written statement wherein he admitted the sale of room and 'medhi' and other contents were denied. The roof of

veranda was not belonging to defendant nor it has been sold. The defendant had only right of use of veranda which has been sold. The roof of veranda is a government property. It was also pleaded that the plaintiff is a deity, therefore, there was no need to ask deity before sale of the property, but before sale of the property the defendant had asked the Pujari Revati Prasad and other trustees about it but they refused to purchase the same and and had given consent to sale it to defendant no.1. It was also pleaded that the plaintiff is a juristic person and has no right of pre-emption. The other pleas were also taken in the written statement and it was prayed that the suit of the plaintiff be dismissed.

On the basis of the pleadings of the parties the learned lower court framed ten issues, which have already been reproduced in the judgment of the lower court. Both the parties led their oral and documentary evidence in support of their case.

The learned lower court, vide its judgment and decree dated 15th of December, 1980 dismissed the suit of the plaintiff with costs. Being aggrieved with the same, the plaintiff preferred an appeal. The first appellate court, vide its judgment and decree dated 24th of September, 1986 allowed the appeal and set-aside the judgment and decree of the lower court and decreed the suit of the plaintiff and it was directed that in case

the plaintiff deposits a sum of Rs.3000/- within a period of two months, then the property, in dispute, may be transferred in favour of the plaintiff through sale-deed, hence this second appeal has been preferred on behalf of the defendant no.2, the purchaser of the property.

During the pendency of this second appeal, the appellant filed two applications under Order 41 Rule 27 of the CPC, which were allowed and the documents annexed with the applications were taken on the record. Thereafter the respondent no.1 also filed an application under Order 41 Rule 27 of the CPC and the same was also allowed and the documents annexed with the application were also taken on the record.

Shri Sagar Mal Mehta, the learned Senior Counsel for the appellant, contended that the plaintiff had no right or locus-standi to file the present suit for pre-emption. The plaintiff is Thakurji Shri Shyam Sunderji but suit has been filed in the name of deity through Revati Prasad, who has claimed himself as the owner of the temple as well as the disputed staircase and roof of veranda, which is used as passage to go in the disputed room and 'medhi' whereas the temple of Thakurji Shri Shyam Sunderji belongs to Meena Community. He referred the order dated 24th of April, 1989 passed by the Assistant Commissioner Devsthan, Jaipur Division, Jaipur, in File No.285/72. The order dated 21st of

November, 1990 passed by the Devsthan Commissioner, Rajasthan, Udaipur, in Appeal No.19/89, which was filed along with the Application under Order 41 Rule 27 of the CPC. Both these orders were passed during the pendency of this second appeal. From these orders it appears that one Ram Pratap Meena filed an application for registration of temple i.e. plaintiff Shri Shyam Sunderji in Form No.6 on 24th of June, 1964, under the provisions of the Rajasthan Public Trust Act, 1959. An enquiry was made and thereafter it was registered on 29th of January, 1970. The order of registration was challenged by Revati Prasad Son of Hira Lal, by filing an appeal before the Devsthan Commissioner, which was allowed on 10th of March, 1970 and the case was remanded back to the Assistant Commissioner, Devsthan, for passing a fresh order in respect of the registration of the temple under the provisions of the Rajasthan Public Trust Act, 1959. The enquiry was again made. The documents were produced. The witnesses were examined. Thereafter the Assistant Commissioner, Devsthan, by a detailed speaking order dated 24th of April, 1989 recorded a finding that the applicants and Meena Community are trustees of plaintiff temple Thakurji Shyam Sunderji and Shyam Sunder Son of late Shri Revati Prasad is only a Pujari. Accordingly the application in Form No.6 dated 24th of June, 1964 was allowed and the earlier order dated 29th of January, 1970 was restored by

rejecting the objection petition filed by the objector Revati Prasad. Thereafter Shyam Sunder Son of late Shri Revati Prasad filed an appeal against the order dated 24th of April, 1989, which was dismissed by the appellate authority i.e. Devsthan Commissioner, Rajasthan, Udaipur, vide its judgment dated 21st of November, 1990. The learned counsel for the appellant, therefore, contended that these judgments were passed after hearing late Shri Revati Prasad and after his death, to Shri Shyam Sunder, his son. He also referred the judgment of this Court dated 28th of March, 1995 which has been placed on the record by the respondent no.1 with its application under Order 41 Rule 27 of the CPC and it was pointed out that the order of the Devsthan Commissioner dated 21st of November, 1990 was challenged by Shyam Sunder Son of late Shri Revati Prasad before this court in S.B. Civil Writ Petition No.4292/1991 and the writ petition was also dismissed on the ground of alternative remedy. Therefore, he contended that the registration of the temple in favour of Meena Community has been finalized not only by the Assistant Commissioner (Devsthan) and the Devsthan Commissioner but by this Court also, therefore, it is clear that Pujari Revati Prasad had no locus standi to file the present suit for pre-emption in respect of the disputed property as the temple was owned by the registered trust of Meena Community, who has not filed the present suit for pre-

emption and has not challenged the sale-deed executed by the defendant no.2 in favour of the defendant no.1, which is a subject matter of the present suit.

The learned counsel for the appellant further contended that right of pre-emption does not accrue in favour of the plaintiff as the case of the plaintiff does not fall within any of the three categories as mentioned in sub-section (1) of Section 6 of the Rajasthan Pre-emption Act, 1966. It is contended that the plaintiff is neither co-sharer or partner in the property transferred nor the plaintiff is owner of other immovable property with a staircase or an entrance or other right or amenity common to such other property and the property transferred. It is contended that veranda of the shops in Kishanpole Bazar, Jaipur City, is a government property, therefore, the staircase as well as the roof of veranda used as passage for going to disputed property cannot be said to be a property of the plaintiff. In this connection, Shri Sagar Mal Mehta, the Senior Counsel for the appellant, referred the judgment dated 23rd of July, 1986 of this Court passed in Prakash Chand Shukla Vs. State of Rajasthan & Others – S.B. Civil Writ Petition No.1532/1984, wherein a gazette notification, published in the Rajasthan Raj Patra dated 17th of July, 1954, has also been reproduced, whereby veranda of all the markets within four-walls of Jaipur City were declared as public-way. This court observed

that it is absolutely clear that this court after hearing all the parties including the Advocate General came to the conclusion that the Municipal Council must decide the case relating to covering of veranda, which is public property, within the four-walls of Jaipur City, in accordance with the provisions of law. The Municipal Council, Jaipur has acted in accordance with the law by issuing a notice under Section 203 of the Act and then by passing an order declaring that there is encroachment on public streets (verandas) and that the occupiers are trespassers and they must remove the encroachment forthwith. It was also observed that it is a primary duty of the Municipal Council to remove the encroachment as it was its statutory duty, therefore, having acted in accordance with law it has performed its duty under the statute leaving nothing for this court to decide. The State Government issued a notification dated June 28, 1986, published in Rajasthan Gazette Extraordinary, dated July 1, 1986, wherein it has appointed a committee to which the revisional powers have been conferred to entertain, hear and decide revision petitions against the orders of Municipal Council passed against trespassers on the verandas. The notification was reproduced wherein a High Power Committee, consisting of Shri G.K. Bhanot (IAS Retired), as Chairman, and Secretary to the Government of Rajasthan, LSG Department, and Law Secretary to the

Government of Rajasthan, as its Members, was constituted and was authorized to exercise the powers of revision. After constitution of the Committee which is in the nature of quasi-judicial Tribunal, the writ petition No.1532/1984 was disposed of on 23.7.1986. Thereafter the revision petitions were filed and the same were heard and disposed of by the Committee and the order of the Committee was challenged by Jaipur Vyapar Mahasangh, Jaipur. The notification dated 17th of July, 1954 declaring all verandas as public street/way was also challenged by Jaipur Vyapar Mahasangh. The said writ petition i.e. S.B. Civil Writ Petition No.246/2000 (D) was dismissed by this court vide judgment dated 11th March, 2000, which is reported in RLW 2000 (3) Rajasthan 1621.

Shri Mehta further contended that thereafter the encroachments of verandas were removed in all the markets within the four-walls of the Jaipur City including Kishanpole Bazar where the plaintiff's temple and the disputed property is situated. He further contended that the Jaipur Vyapar Mahasangh filed D.B. Civil Special Appeal No.125/2000, against the order of the learned Single Judge dated 11th March, 2000 and the said special appeal No.125/2000 has also been dismissed by the Division Bench of this Court vide order dated 6th February, 2004 and in these circumstances it is proved beyond doubt that the veranda in front of shops in

Kishanpole Bazar is a Government property and naturally its roofs are also the government property and in these circumstances the plaintiff cannot claim a right of pre-emption in respect of disputed property, the approach of which is through roof of veranda also.

Shri Mehta also contended that a right of pre-emption is a weak right as held by the Hon'ble Supreme Court in the cases of Indira Bai Vs. Nand Kishore (AIR 1991 SC 1055) and Krishna Dass Agarwal Vs. Kanhaiyalal (1996) 9 SCC 488.

Shri Mehta further contended that although the plaintiff filed a suit under Section 22 of the Rajasthan Public Trust Act, 1959 for declaration and permanent injunction in the court of Munsiff & Judicial Magistrate (Junior Division), Jaipur West, Jaipur, in view of the judgment of this Court dated 28th of March, 1995, passed in S.B. Civil Writ Petition No.4292/1991, which is still pending, but the said suit under Section 22 of the Rajasthan Public Trust Act, 1959, is not maintainable as the plaintiff is claiming a title in the said suit adverse to the public trust and in support of his contention he referred in the case of Mehta Charity Trust Vs. Gulam Rasool & Others {1986 (2) WLN 433}, which is based on the judgment of the Hon'ble Supreme Court in the case of Abdul Karim Khan Vs. Raipur Municipality (AIR 1965 SC 1744). He also referred to Sections 22 and 73 of the Rajasthan Public Trust Act,

1959.

Shri Ganga Lahari Pareek, the learned Senior Advocate, appearing on behalf of the plaintiff-respondent, contended that the substantial questions of law formulated in the present case are not the substantial questions of law within the meaning of Section 100 of the CPC. In support of his contention, he referred to the decision in the case of Kondiba Dagadu Kadam Vs. Savitribai Sopal Gujar & Others {1999 (4) Supreme 108}, wherein it has been held that the conditions mentioned in Section 100 of the CPC must be strictly fulfilled before the second appeal can be maintained. After the amendment, a second appeal can be filed only if a substantial question of law is involved in the case. There is distinction in between question of law and substantial question of law. If the question of law termed as substantial question stands already decided by a larger bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court, its merely wrong application on facts of the case would not be termed to be substantial question of law.

Shri Pareek further contended that both the questions formulated in the present second appeal as substantial questions of law are not legal but they require enquiry of fact therefore they cannot be said to be substantial questions of law and in support of his

contention he referred the cases of Santosh Hazari Vs. Purushottam Tiwari (Dead) by Lrs. (AIR 2001 SC 965), Govindaraju Vs. Mariamman {2005 (1) Supreme 838}, Kondiba Dagadu Kadam Vs. Savitribai Sopal Gujar (AIR 1999 SC 2213).

Shri Pareek further contended that in second appeal, no new point can be allowed to be raised, and in support of his contention, he referred the cases of Kshitish Chandra Purkait Vs. Santosh Kumar Purkait & Others (AIR 1997 SC 2517), Smt. Chander Kali Bail Vs. Jagdish Singh Thakur (AIR 1977 SC 2262).

Shri Pareek further contended that he has placed on the record two documents i.e. the judgment dated 28th of March, 1995 passed by this Court in S.B. Civil Writ Petition No.4292/1991 and copy of the plaint under Section 22 of the Rajasthan Public Trust Act filed by the plaintiff in the lower court, which is still pending, along with an application under Order 41 Rule 27 of the CPC. He referred both the documents during the course of arguments to satisfy this court that the order of Assistant Commissioner, Devsthan, and Devsthan Commissioner, whereby the plaintiff temple was registered under the provisions of the Rajasthan Public Trust Act, in the name of Meena Community was challenged by the plaintiff by way of writ petition before this Court but the same was dismissed only on the ground of efficacious alternative remedy and as per direction

given in the judgment, the plaintiff has already filed a civil suit which is still pending in the lower court, therefore, the title of the plaintiff temple is still pending and sub-judice before the lower court and it cannot, therefore, be said that the plaintiff temple belongs to Meena community and the present plaintiff has no locus-standi to file the present suit for pre-emption in respect of the disputed property.

Shri Pareek also contended that a right of pre-emption in respect of the disputed property accrued to the plaintiff under clause (ii) of sub-section (1) of Section 6 of the Rajasthan Pre-emption Act, 1966 as there is a common staircase to go in temple as well as in the disputed property. In support of his contention, Shri Pareek referred to the cases of Bhau Ram Vs. Baijnath (AIR 1962 SC 1476) and Smt. Prem Dulari Vs. Smt. Raj Kumari (AIR 1967 SC 1578). He referred that right of pre-emption accrues on the basis of common staircase as held by the Hon'ble Supreme Court, therefore, the question involved in the present case has already been decided and a question which has already been decided by the Supreme Court cannot be said to be a substantial question of law.

Learned counsel for the plaintiff-respondent, Shri Ganga Lahari Pareek, also referred the finding of the first appellate court wherein it has been observed that the staircase which is used to go upper side,

belongs to the plaintiff and thereafter one reaches at the roof of veranda. The first appellate court has also observed that the roof of veranda marked as “B” was got constructed by the plaintiff and the plaintiff's right of easement to use the roof of veranda is also proved, therefore, a right of pre-emption in respect of disputed property has been accrued in favour of the plaintiff. The first appellate court has also recorded a finding that no notice was given by the defendant no.2 to the plaintiff before selling the property in dispute to the defendant no.1 and the plaintiff had refused to purchase it. Shri Pareek, on the basis of the above finding recorded by the first appellate court, contended that these findings are findings of fact by the first appellate court, which is binding in the second appeal and the same cannot be interfered with by this court. He further contended that the findings of the lower court in respect of issues no.5 to 8 were not challenged by the defendant before the first appellate court by way of cross-objection or cross-appeal, therefore, so far as the finding in respect of issues no.5 to 8 are concerned, it should be presumed that there is concurrent finding by both the courts below and these are only the findings of fact which cannot be challenged in second appeal. He also contended that the pleas which were not raised before the lower court, or not pressed, cannot be allowed to be taken in the second appeal. In

support of his contention, he referred to the case of Babu Ram @ Durga Prasad Vs. Indra Pal Singh (dead) by L.Rs. (AIR 1998 SC 3021).

I have considered the submissions of the learned counsel for both the parties and minutely scanned the impugned judgments passed by both the courts below.

For ready reference sub-section (1) of Section 6 of the Rajasthan Pre-emption Act, 1966 is reproduced as under:-

> 6. Persons to whom right of pre-emption accrues.- (1) Subject to the other provisions of this Act, the right of pre-emption in respect of any immovable property transferred shall accrue to, and vest in, the following classes of persons, namely:-
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> (i) Co-sharer or partner in the property transferred;
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> (ii) owners of other immovable property with a stair-case or an entrance or other right or amenity common to such other property and the property transferred, and
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> (iii) owners of property servient or dominant to the property transferred."

In Prakash Chand Shukla's case (supra) the

notification dated 17th of July, 1954 was reproduced which was published in the Rajasthan Raj Patra, declaring the verandas of all the markets within the four-walls of the Jaipur City, as public way/public street. The Municipal Council has always taken a stand that the notification of 1954, which declares the verandas as public street is still a valid notification and the Municipal Council is the owner of the same. The Municipal Council took a final decision for removing the trespassers on the verandas. The notices were issued by the Municipal Council to all the occupiers of the verandas to remove encroachment. The orders were passed by the Municipal Council for removal of the encroachment on public streets (verandas) and declaring occupiers as trespassers. The State Government issued a notification dated 28th of June, 1986 which was published in Rajasthan Gazette Extraordinary dated 1st of July, 1986, whereby a Committee was constituted to whom revisional powers were conferred to hear all revision petitions/'objections in respect of verandas of all markets within the four-walls of the Jaipur City. This notification has also been reproduced in the above judgment. In view of the fact that the Committee had already been constituted by the State Government, the writ petition No.1532/1984 was disposed of.

In Jaipur Vypar Mahasangh's case reported in RLW 2000 (3) RLW 1621, a writ petition was filed challenging

the order of Committee constituted under Section 300 of the Rajasthan Municipalities Act, the reference of which was given in above referred judgment of this Court dated 23rd of July, 1986. The notification dated 17th of July, 1954, whereby all verandas, in all the markets within the four-walls of Jaipur City were declared as public street, was also challenged. The writ petition was dismissed. The occupiers of the verandas (Jaipur Vyapar Mahasangh) further challenged the order of the learned Single Judge by filing special appeal before the Division Bench of this Court, being D.B. Special Appeal (W) No.125/2000, which has also been dismissed vide order dated 6th February, 2004 meaning thereby all verandas including the verandas of Kishanpole Bazar, within the four-walls of the Jaipur City, are the government property.

In the case of Indira Bai Vs. Nand Kishore (supra), the Hon'ble Supreme Court held that the right of pre-emption is a weak right and it can be defeated by estoppal. In the case of Krishna Dass Agarwal Vs. Kanhaiyalal (supra), the Hon'ble Apex Court held that the right of pre-emption is a weak right.

In the case of Mehta Charity Trust Vs. Gulam Rasool & Others (supra) the Hon'ble Supreme Court held that no suit by a person claiming a title adverse to the public trust could be maintained under Section 22 of the Rajasthan Public Trust Act, 1959 for the cancellation of

the entries made under Section 21 as such a suit pre-supposes the existence of the public trust and the property thereof.

In the case of Abdul Karim Khan Vs. Raipur Municipality (supra) the Hon'ble Supreme Court held that a person claiming interest adverse to public trust, cannot file a suit.

Sections 22 and 73 of the Rajasthan Public Trust Act, 1959, are also reproduced as under:-

> “22. **Civil suit against entries made under Section 21**.- (1) Any working trustee or person having interest in a public trust or in any property found to be trust property aggrieved by any entry made under Section 21 may, within six months from the date of the publication thereof on the notice board of the office of the Assistant Commissioner under sub-section (1) of Section 21, institute a suit in a civil court to have such entry cancelled or modified.
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> (2) In every such suit the civil court shall give notice to the State Government through the Assistant Commissioner and the State Government, if it so desires,

> shall be made a party to the suit.
> (3) On the final decision of the suit, the Assistant Commissioner shall, if necessary, correct the entries made in the register in accordance with such decision.”
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> “73. **Bar of jurisdiction**.- Save as expressly provided in this Act, no civil court shall have jurisdiction to decide or deal with any question which is by or under this Act to be decided or dealt with by any officer or authority under this Act or in respect of which the decision or order of such officer or authority has been made final and conclusive.”

In the case of Kondiba Dagadu Kadam Vs. Savitribai Sopal Gujar & Others (Supra) the Hon'ble Apex Court held that -

> “After the amendment a second appeal can be filed only if a substantial question of law is involved in the case. The memorandum of appeal must precisely state the substantial

question of law involved and the High Court is obliged to satisfy itself regarding the existence of such question. If satisfied, the High Court has to formulate the substantial question of law involved in the case. The appeal is required to be heard on the question so formulated. However, the respondent at the time of the hearing of the appeal has a right to argue that the case in the court did not involve any substantial question of law. The proviso to the Section acknowledges the powers of the High Court to hear the appeal on a substantial point of law, though not formulated by it with the object of ensuring that no injustice is done to the litigant where such question was not formulated at the time of admission either by mistake or by inadvertence.... If the question of law termed as substantial question stands already decided by a larger bench of the High Court concerned or by the Privy Council or by the Federal Court or by the Supreme Court, its merely wrong application on facts of the case would not be termed to be substantial

question of law.”

In the case of Santosh Hazari Vs. Purushottam Tiwari (Dead) by Lrs. (supra) the Hon'ble Supreme Court considered the meaning of phrase “substantial question of law”. The relevant Para of the judgment is reproduced as under:-

> “14. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law 'involving in the case' there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by Court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point

> raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any list.”

In the case of Govindaraju Vs. Mariamman (supra) the Hon'ble Supreme Court held that the High Court was not justified in re-appreciating the entire evidence and reversing findings of both the Courts below

In the case of Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar (supra) the Hon'ble Supreme Court held that in second appeal, relief cannot be granted merely on equitable grounds. The concurrent finding of facts howsoever erroneous, cannot be interfered with.

In the case of Kshitish Chandra Purkait Vs. Santosh Kumar Purkait (supra), the Hon'ble Supreme Court

held that it was not proper on the part of the High Court to permit new plea to be raised in second appeal on the ground that it was a legal. The High Court has to satisfy itself for permitting to raise new plea, that the case involves substantial question of law.

In the case of Smt. Chander Kali Bail Vs. Jagdish Singh Thakur (supra) the Hon'ble Supreme Court held that the new question of fact cannot be entertain at any appellate stage.

In Bhau Ram Vs. Baijnath Singh (supra) the Hon'ble Supreme Court was dealing with the case relating to Section 16 of the Punjab Pre-emption Act (1 of 1913) and in the facts and circumstances of that case, with reference to Section 16 held that the first ground which gives a right of pre-emption to a co-sharer in the property sold, it was held that on the whole it seems to us that a right of pre-emption based on co-sharership is a reasonable restriction on the right to acquire, hold and dispose of property and is in the interest of general public. The fourth ground in Section 16 of the Punjab Pre-emption Act, “where the sale is of a property having a common entrance from the street with other properties, in the owners of such properties”, it was observed that “The idea behind this ground seems to be that the buildings are in a common compound and perhaps were originally put up by members of one family or one group with a common private passage from the public.

In the case of Smt. Prem Dulari Vs. Smt. Raj Kumari (supra) the Hon'ble Supreme Court considered Section 15 (fourthly) of the Jammu & Kashmir Right of Prior Purchase Act (2 of 1993 Samvt.) and in the facts and circumstances of that particular case, observed that -

> “4. The construction urged before the trial court and the High Court and rejected by both of them was once again urged before us by Mr. Misra. The language of S.15 (fourthly) is plain. The section in unambiguous language provides that “the right of prior purchase ..... shall vest -
> Fourthly: Where the sale is of property having a common outer entrance with other properties in the owners of such properties”.
> The section clearly says that where the sale is of property having a common outer entrance with other properties the right of prior purchase shall vest in the owners of such properties. There is nothing in the section to warrant the construction that such a right would vest only if the common outer entrance is jointly

> owned by the owners of such houses. What the section requires is the existence of a common outer entrance which need not be owned by the person claiming the right of pre-emption. Whether there is such a common outer entrance which would attract the provisions of S.15 (fourthly) would, therefore, depend upon the facts proved in each case. In the present case, both the trial court as also the High Court came to the conclusion from the evidence led by the parties that there does exist a common outer entrance for both the houses. Nothing has been shown by Mr. Misra from the evidence which would justify our disagreeing with that conclusion."

In the case of Babu Ram @ Durga Prasad Vs. Indra Pal Singh (dead) by L.Rs., the Hon'ble Supreme Court observed that in second appeal under Section 100 of the CPC the High Court has no jurisdiction to give a finding on an issue which was not pressed in the trial court.

In the light of the facts of this case, as mentioned above, and the various citations, as referred above, now I deal with the substantial questions of law formulated in the present case.

The plaintiff filed a suit for pre-emption pleading therein that the approach to go on the disputed room and 'medhi' is through the plaintiff's staircase facing eastern side and the plaintiff's veranda's roof; the plaintiff's house and the disputed room and 'medhi' are having common wall, in Para 3 of the plaint the staircase facing eastern side and roof of verandas have been shown as exclusive property of the plaintiff and the approach to go in the disputed house is through the said staircase and roof of veranda. The plaintiff, in its plaint, has not mentioned specifically as to under which clause of sub-section (1) of Section 6 of the Act of 1966 his case falls. However, during the course of argument it was stated that the case of the plaintiff falls in clause (ii) of sub-section (1) of Section 6 of the Act, wherein it is provided that right of pre-emption shall accrue to owners of other immovable property with a staircase or an entrance or other right or amenity common to such other property and the property transferred. The learned lower court, in its judgment dated 15th of December, 1980 decided issue no.1 in favour of the defendants and against the plaintiff. The lower court considered that the question involved in the present case is as to whether the property through which a person passes on the disputed property belongs to plaintiff. The plaintiff, in his statement, has admitted that the way to go on the disputed property is

through staircase marked as “A”, the roof marked as “B” and thereafter another roof marked as “C”. The plaintiff has also admitted that his roofs are adjacent with the roof of Sita Bai. The plaintiff has not placed on the record any documentary evidence to show his ownership claiming the said way of his own. The lower court observed that the roof of veranda in front of shops in all the markets within the four-walls of Jaipur City is not a personal property of anyone. The burden to prove this fact was on the plaintiff that he was the owner of the roof. The lower court also observed that from the statement of PW-2 also it appears that the roof of veranda belongs to government. The lower court recorded a finding after appreciating the evidence that the way to go on the disputed property is not a part of property of the plaintiff beyond staircase. The lower court also considered the notification of the Municipal Council dated 28th of May, 1954 whereby all verandas of all the markets within the four-walls of Jaipur City were declared as property of the Municipal Council. The lower appellate court set aside the finding of the lower court and held that right of pre-emption accrues in favour of the plaintiff in the present case under clause (ii) of sub-section (1) of Section 6 of the Rajasthan Pre-emption Act, 1966. The lower appellate court recorded a finding that the roof of veranda marked as “B” was got constructed by the plaintiff. The lower appellate court

also observed that even if ownership of the plaintiff over the roof of veranda is not proved then still the plaintiff has a right of easement in that respect. The lower appellate court also observed that it is necessary to pass through the staircase of the plaintiff to reach in the disputed property and without passing through the staircase belonging to the plaintiff it is not possible to reach in the disputed property, therefore, the right of pre-emption had accrued in the disputed property in favour of the plaintiff under clause (ii) of sub-section (1) of Section 6 of the Rajasthan Pre-emption Act, 1966. The notification dated 17th of July, 1954 published in the Rajasthan Raj Patra makes it clear that all the verandas within the four-walls of the Jaipur City were declared to be public street. The lower court has observed that the plaintiff has not placed on the record any documentary evidence to show his ownership in respect of the roof of veranda. The first appellate court has recorded a finding that the staircase is exclusive property of the plaintiff and the roof of veranda was got constructed by the plaintiff. The first appellate court has not given any basis for declaring the staircase as exclusive property of the plaintiff. So far as verandas are concerned it is clear that all verandas in front of shops in all markets within the four-walls of the Jaipur City including Kishanpole Bazar, where disputed property is situated, belong to

Municipal Council and on the face of notification dated 17th of July, 1954 and in absence of any documentary evidence in favour of the plaintiff to prove the title of the plaintiff, it is clear that the veranda is a property of the Municipal Council/State and the roof of veranda will also be treated as property of the Municipal Council/State. The disputed staircase is also erected parallel to verandas. The verandas are situated in front of the shops and parallel to veranda towards southern side staircase is erected in place of veranda in front of temple. It shows that the land on which the staircase is situated does not and cannot belong to the plaintiff. The plaintiff might have a right to go in the temple through this staircase and their can be right of easement in favour of the plaintiff but the plaintiff cannot claim the land on which staircase is constructed as his exclusive property or in his ownership. The suit for pre-emption does not lie on the basis of right of easement and a reference in this regard may be given to the case of Nen Mal and Others Vs. Kan Mal and Others, AIR 1988 Rajasthan 33. The plaintiff is neither the owner of the staircase marked as “A” nor the roof of veranda marked as “B” and “C”, and in these circumstances it cannot be said that any right of pre-emption in respect of disputed property accrue to the plaintiff in any clause of sub-section (1) of Section 6 of the Rajasthan Pre-emption Act, 1966. The judgment of

the first appellate court is not based on any cogent evidence and its finding is perverse, which is liable to be set aside. The first appellate court has not given any reasons for not agreeing with the finding of the lower court or for taking contrary view from the lower court.

It is relevant to mention that there is a reference of constitution of Committee by the State Government in the judgment of this Court dated 23rd of July, 1986 and another judgment reported in RLW 2000 (3) Rajasthan 1621 (Jaipur Vyapar Mahasangh & Another Vs. State of Rajasthan & Others). The Municipal Council issued a notice to all the occupiers of the verandas to remove encroachment and all occupiers were declared as trespassers. The revision petitions were preferred by all the occupiers before the Committee having revisional powers under Section 300 of the Rajasthan Municipalities Act. All the revision petitions were dismissed by the revisional authority. The order of the Committee dismissing the revision petitions as well as the notification of 1954, both, were challenged in Writ Petition but the said writ petition was dismissed by this court and the said judgment is reported in RLW 2000 (3) Rajasthan 1621, and the D.B. Special Appeal filed against that judgment was also dismissed by the Division Bench of this Court vide order dated 6th of February, 2004. The notification of 1954, the judgment dated 23rd

of July, 1986, the judgment of the Division Bench dated 6th of February, 2004 are public documents and a judicial notice of these judgments delivered by the Single Bench and the Division Bench of this Court itself can be taken. The third judgment is already reported in RLW 2000 (3) Rajasthan 1621. These judgments are relevant in the present case as while considering the right of the plaintiff regarding pre-emption it is also necessary to consider whether veranda in front of shops in Kishanpole Bazar, Jaipur City, Jaipur and roof of veranda are personal property of the plaintiff or it is a property of the Municipal Council. A judicial notice can be taken in respect of the judgments passed by the Single Judge as well as Division Bench of this Court. A notification of 1954 published in Rajasthan Gazette, has also been reproduced in the above judgment. From the above discussion in respect of all these judgments including notification it is clear that all verandas in front of shops in Kishanpole Bazar, Jaipur City, Jaipur, are the property of the Municipal Council, Jaipur/State Government and not the property of any individual including the plaintiff. Although, the first appellate court has recorded a finding that the roof over veranda was constructed by the plaintiff and staircase marked as “A” is in the ownership of the plaintiff. The plaintiff is the owner of staircase and roof of veranda is, no doubt, a question of fact but the finding of the first

appellate court is based on no evidence. The lower court has observed that no documentary evidence has been placed on the record in support of claim of ownership of the plaintiff and the first appellate court has not referred any document in support of his finding in favour of the plaintiff while reversing the finding of lower court. Such a finding by the first appellate court can definitely be interfered with by this court in second appeal under Section 100 of the CPC. On the basis of above discussion, when a conclusion is drawn that the plaintiff is not the owner of the disputed staircase and roof of veranda and he has only right of easement in respect of staircase and roof of veranda, then definitely the right of pre-emption does not accrue in his favour in any clause of sub-section (1) of Section 6 of the Rajasthan Pre-emption Act, 1966 and in these circumstances the question no.1 formulated in the second appeal is decided accordingly.

So far as second question formulated as substantial question of law in the second appeal is concerned, the learned counsel for the plaintiff stated that suit filed in the name of the deity through Pujari and not through registered trust, is also maintainable. He referred Exhibit-8, the judgment dated 31st of October, 1955 passed by the Munsiff, Jaipur City (West), Jaipur, wherein Revati Prasad was declared as trustee and Pujari of the plaintiff temple. The counsel for the

defendant-appellant submitted that the plaintiff temple is a trust registered under the provisions of the Rajasthan Public Trust Act and entry in this regard has already been made under Section 21 of the Rajasthan Public Trust Act. It is clear from the judgments dated 24th of April, 1989 passed by the Assistant Commissioner, Devsthan and the judgment dated 21st of November, 1990 passed by Devsthan Commissioner, Rajasthan, that on 24th of June, 1964, an application for registration of the trust in From No.6 was filed in respect of the plaintiff temple by one Ram Ratan Meena and after considering the objections filed on behalf of Pujari Revati Prasad it was decided that the applicant and Meena Community have constructed the temple Thakurji Shri Shyam Sunderji situated at Kishanpole Bazar and they are trustees of it and objector Shyam Sunder S/o late Shri Revati Prasad is its Pujari. Appeal was preferred against the order dated 24th of April, 1989 passed by Assistant Commissioner, Devsthan, but the appeal filed by Shyam Sunder was also dismissed by the Devsthan Commissioner i.e. the appellate authority. Thereafter a writ petition was also preferred before this court i.e. S.B. Civil Writ Petition No.4292/1991 – Shyam Sunder Vs. State of Rajasthan, but the same was also dismissed vide order dated 28th of March, 1995. This court dismissed the writ petition on the ground of alternative efficacious remedy and a liberty was given to Shyam Sunder to file a civil

suit under Section 22 of the Rajasthan Public Trust Act. The plaintiff Shyam Sunder has already filed Civil Suit under Section 22 and the same is still pending. From the above facts it is clear that at present the plaintiff temple is owned by the trust, registered under the provisions of Rajasthan Public Trust Act, of Meena Community and entry to this effect exists in Devsthan Department, Jaipur. The said entry has been affected with effect from 24th of June, 1964 whereby the present suit was filed on 4th of January, 1969. The judgment of the Single Bench of this Court dated 28th of March, 1995 has not been challenged as informed by both the parties, and it has attained finality.

So far as the suit filed by the plaintiff Shyam Sunder under Section 22 is concerned, an argument has been raised on behalf of the defendant-appellant that the said suit is not maintainable as it has been filed on behalf of the person claiming a title adverse to the public trust. The plaintiff Shyam Sunder wants to get a declaration in respect of said temple as his own property. The plaintiff Shyam Sunder himself as mentioned in Para 15 of the plaint that although Section 22 of the Rajasthan Public Trust Act is not applicable on the present suit but he has filed this suit as directed by the High Court in its judgment dated 28th of March, 1995. The suit filed under Section 22 by Shyam Sunder is maintainable, or not, is not a question to be

decided in this second appeal, and any finding or observation in this regard by this court may affect the result of the suit, therefore, this point is left open for decision by the competent court.

However, in view of the fact that the judgment dated 28th of March, 1995 passed by this Court in S.B. Civil Writ Petition No.4292/1991 has attained finality, it is clear that the plaintiff temple is owned by a registered trust and persons belonging to Meena Community and its trustees, and Shyam Sunder, who is only a Pujari of the said temple, can not maintain the present suit for pre-emption particularly when the Pujari is claiming this property as his personal property and not of deity. The defendant no.1-appellant purchased the disputed property in the year 1968 through registered sale-deed and for last 38 years he is residing in the said property. The Hon'ble Supreme Court in the cases of Indira Bai Vs. Nand Kishore (AIR 1991 SC 1055) and Krishna Dass Agarwal Vs. Kanhaiyalal (1996) 9 SCC 488, (supra) has also observed that right of pre-emption is a weak right.

In view of the above discussion the question no.2 formulated in this second appeal is decided holding that Revati Prasad Sharma had no locus standi to file the present suit for pre-emption in the name of Temple owned by registered trust and more-so when he is claiming the temple itself as his personal property and

not of deity, and therefore, the present suit for pre-emption is liable to be dismissed.

In view of the above discussion, the second appeal filed by the defendant no.1-appellant is allowed and the impugned judgment and decree passed by the first appellate court is set aside and the judgment and decree passed by the lower court is restored. It is made clear that any observations made herein-above in this order by this Court will not be binding on the concerned court while deciding suit of the plaintiff filed under Section 22 of the Rajasthan Public Trust Act. Cost is made easy.

(Narendra Kumar Jain) J.

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